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IN THE

Supreme Court of the United States

OCTOBER TERM, 1961.

No. 949

JEWELL GABBARD LITTERAL AND LOUIS DYSON,
Petitioners,

vs.

INDEMNITY INSURANCE COMPANY OF NORTH AMERICA, A CORPORATION,
Respondent.

BRIEF FOR RESPONDENT OPPOSING PETITION FOR WRIT OF CERTIORARI

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

COUNTERSTATEMENT.

Respondent considers the Petitioner's "Statement of the Case" insufficient to fully present to the Court the matters here in issue and, therefore, offers the following counterstatement.

On September 5, 1955, one Robert Schindler borrowed a Globe Swift aircraft from Louis Dyson, d b a Illini Airport, in Urbana, Illinois. (App. 2-3.) Shortly after take off, with the Petitioner, Jewell Litteral, riding with him, the aircraft crashed. Jewell Litteral having suffered injuries in the aircraft accident, recovered a judgment against Louis Dyson d b a Illini Airport. (App. 45.)

The Petitioner, Aywell Gabbard Litteral, thereafter instituted the present garnishment suit against Respondent, Indemnity Insurance Company of North America, including as a party the name of Louis Dyson, from whom she had previously secured such judgment.

Louis Dyson was the operator of the Illini Airport at Urbana, Illinois. In this garnishment suit, he is a nominal party and did not appear or participate therein.

On August 26, 1955, Dyson secured from the Respondent an "Aircraft Liability Policy." On April 3, 1955, Dyson had secured from Respondent a policy of insurance designated "Airport Liability Policy." On September 5, 1955, the date of the accident in which Petitioner was injured, both of these policies were in full force and effect. (App. 2-3)

The Respondent, in answer to the garnishment Summons and Interrogatories, denied any indebtedness to Dyson or possession of any assets or claims due him. (App. 9)

The District Court, after a hearing on the merits, filed a memorandum opinion containing its findings of fact and conclusions of law, and thereupon entered a judgment discharging the Respondent as garnishee and dismissing the garnishment proceedings. (App. 9-19).

The findings of fact in the original action against Dyson contained the following paragraph:

> "that on the 5th day of September, 1955, the defendant, Louis Dyson, doing business as Illini Airport, was the owner of and possessed a certain airplane known as a Globe Swift Model GC 1B Airplane, Identification Number 80621, which said plane was located at a certain airport known as Illini Airport. " " " (App. 8-10).

Further findings of fact established that Dyson had entered into negotiations on September 5, 1955 to sell the Globe Swift aircraft to one Robert Schindler, who re-

quested permission to use the aircraft to take a trip to another state several hundred miles away. (App. 6)

Dyson had assured Schindler that the Globe aircraft was in a good mechanical condition. There were certain wires and hazards located near the Illini Airport which Dyson knew or should have known that the Globe aircraft, with its type of propeller, would have difficulty in flying over, but that he directed Schindler to take off as a result of which, shortly after and near the Illini Airport, the aircraft crashed to the ground and the Petitioner, who was in the airplane with Schindler, was injured. The findings of fact in the memorandum opinion of the 18th Circuit Court further disclosed:

> "that said defendant (Dyson), either by himself or by his agents and servants negligently and carelessly did one or more of the following acts or omitted to do said acts, namely:
>
> "a. Negligently and carelessly directed the pilot of said airplane to take said airplane off the ground and into the air when a cross wind was blowing along the flight strip.
>
> "b. Negligently and carelessly directed the pilot of said airplane to pilot said airplane into the air when it was too close to the outside edge of the flight strip, and so as to create a hazard.
>
> "c. Negligently and carelessly furnished an airplane with a defective propeller or a propeller which was of a design not suited or proper for installation in said airplane.
>
> "d. Negligently and carelessly operated said airport and operated said airport in violation of the provisions of the Statutes of Illinois and the Civil Aeronautics Regulations, and failed to make an inspection of said airplane as required, and did negligently and carelessly operate said airport with a hazard as is alleged herein, located thereby." (App. 10.)

THE AIRCRAFT LIABILITY POLICY (NO. 38622).

The aircraft policy recited in Item 4:

"The insurance afforded is only with respect to such and so many of the following coverages as are indicated by specific premium charge or charges. The limit of the company's liability against each such coverage shall be as stated herein, subject to all of the terms of this policy having reference thereto." (App. 11.)

Under Item 5 of the aircraft policy, the description of the aircraft is:

"All NC Licensed Aircraft Owned, Operated, Leased or Borrowed by the Named Insured."

Attached to this aircraft policy are various endorsements, the pertinent provisions thereof being as follows:

"Endorsement No. 1.

"Automatic Attachment and Termination of Coverage:

The coverages as indicated in the schedule of Coverages of this policy shall apply to all aircraft having an 'NC' certificate issued by the United States Civil Aeronautics Administration owned by the insured at the inception date of this policy and shall automatically apply to any similarly certificated aircraft acquired by the insured as owner during the policy period. This insurance shall terminate with respect to any aircraft disposed of on the date of sale of such aircraft or the surrender of the legal possession thereof by the insured or upon expiration of this policy, whichever may first occur.

"Deposit Premium and Rates:

* * *

The rates for this policy are:

Coverages	Rates
D & F	$.14 per day, each aircraft owned and operated.

Coverage E not provided except as respects the planes described in Endorsement No. 2." (App. 11-12.)

"Endorsement No. 2

In consideration of premium to be determined by audit it is agreed that with respect to the following aircraft only:

1. Coverage E, Passenger Bodily Injury Liability is amended to read:
   $20,000.00 each person
   $60,000.00 each occurrence
2. The rate for the above extension shall be $.40 per day owned or operated and shall be applicable only to:
   Navion
   Piper Tri-Pacer
   Piper Tri-Pacer
   Piper PA 22

Endorsements 3, 4, 5, 6 and 7 add and delete other planes, but the Globe Swift aircraft involved in the accident was not listed or mentioned on any endorsement. (App. 42.)

The aircraft policy contained three items of coverage under the heading "Insuring Agreements", substantially as follows:

"Coverage D—Bodily Injury Liability excluding Passengers to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages, including damages for care and loss of services, because of bodily injury, sickness, disease or mental anguish, including death at any time resulting therefrom, sustained by any person or persons other than passengers as defined herein, arising out of the ownership, maintenance or use of the aircraft as described in this policy."

"Coverage E—Passenger Bodily Injury Liability to pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages, including damages for care and loss of services, because of bodily injury, sickness, disease or mental anguish, including death at any time resulting therefrom, sus-

tained by any passenger or passengers as defined herein, arising out of the ownership, maintenance or use of the aircraft as described in this policy."

"Coverage F—Property Damage Liability." (App. 12-13.)

THE AIRPORT LIABILITY POLICY (NO. 9941).

The airport liability policy contained two pertinent provisions, as follows:

"Insuring Agreements"

"Coverage A—Bodily Injury Liability to pay on behalf of the insured, provided premium is charged under Coverage A in the declarations, all sums which the insured shall become legally obligated to pay as damages, including damages for care and loss of services, because of bodily injury, sickness, disease or mental anguish including death at any time resulting therefrom, sustained by any person or persons and arising out of the ownership, maintenance or use of the airport premises described in the declarations and all operations which are necessary or incidental to the ownership, maintenance or use of said premises as an airport."

* * *

"Exclusions"

"This policy does not apply:

* * *

"(f) to bodily injury or death or injury to or destruction of property caused by or arising out of (1) the existence, maintenance or use of any aircraft owned by, hired by or for, or loaned to the insured or any aircraft in flight by or for the account of the insured." (App. 13-14 and 27-28.)

On September 10, 1955 (five days after the accident in which Petitioner was injured), the Respondent, through an authorized agent, signed an accident report form and filed

it with the Department of Aeronautics of the State of Illinois, as required by the provisions of the Illinois Statute. (App. 17.) In this report, it was stated by Respondent that with regard to the "aircraft policy" of Louis Dyson, such policy did afford bodily injury coverage, including passenger liability of not less than $5,000.00 for any one person, and that such policy did afford property damage coverage of not less than $5,000.00. (App. 29.)

SUMMARY OF ARGUMENT.

1. The aircraft liability policy did not insure the Globe Swift aircraft involved in the accident for injuries to Petitioner, who was a passenger therein.

2. The aircraft policy cannot be rewritten to provide passenger injury coverage on the Globe aircraft on the basis of any waiver or estoppel resulting from the filing by Respondent of an accident report form with the Department of Aeronautics of Illinois.

3. Neither can the aircraft policy be rewritten to provide coverage to Petitioner, a passenger, on the theory that the accident report of Respondent constituted a practical construction of an ambiguous contract by both parties thereto.

4. The Petitioner's injuries arose out of the crash of an aircraft owned by Dyson, the insured. The airport policy has excluded any coverage for injuries arising out of the existence, use or flight of an aircraft owned by the insured.

PROPOSITIONS OF LAW RELIED UPON.

The primary purpose in construing an insurance policy contract is to give effect to the intention of the parties, as expressed in the contract.

Leatin v. *Continental Insurance Company*, 412 Ill. 158, 162, 163 (105 N. E. 2d 735, 735).

Merchants Transportation Company v. *Dubuque Fire and Marine Insurance Company*, 200 Fed. 2d 348, 351.

Where the language of the contract is clear, the terms are to be taken and understood according to their plain ordinary and popular sense. The intention of the parties must be ascertained from the words used, where such words are of aid in determining such intention.

Moscov v. *Mutual Life Insurance Company*, 387 Ill. 378, 383-385 (56 N. E. 2d 399, 402-403).

The contract of insurance must be construed according to the sense and meaning of the terms the parties have used.

Sistler v. *Illinois Bankers Life Company*, 341 Ill. App. 512, 520 (95 N. E. 2d 507, 511).

Insurance contracts commonly define the hazards and the extent of coverage. A court cannot reject some express statements of coverage and declare that another coverage was intended to apply in all cases. The court cannot under the guise of construction make a new contract for the parties. No perversion of language can be permited in order to create an ambiguity where none exists.

Yadro v. *United States Fidelity & Guaranty Company*, 4 Ill. App. 2d 477, 481-482 (124 N. E. 2d 370, 372).

In construing a contract of insurance, all riders and endorsements constitute, with the policy, one entire contract. If there be any conflict between policy and endorsement, the terms of the endorsement will control.

Quinlan & Tyson v. National Casualty Company, 311 Ill. App. 369, 378 (36 N. E. 2d 470, 474-476).

Konrad v. Hartford Accident Company, 11 Ill. App. 2d 503, 526 (137 N. E. 2d 855, 866-867).

Morris & Company v. Rhode Island Insurance Company, 181 Ill. App. 500, 504 (17 N. E. 2d 619, 621).

An insurance contract must be construed as any other contract.

Harrell v. Bankers Mutual Life Insurance Company, 302 Ill. App. 374, 379-380 (23 N. E. 2d 818, 821).

In the absence of a clear and apparent ambiguity, neither party is favored in construction of an insurance policy.

Colonial Coach Manufacturing Company v. Home Insurance Company, 260 Fed. 2d 532, 534.

Carter v. Nehi Beverage Company, 329 Ill. App. 329, 332 (68 N. E. 2d 622, 623).

The doctrine of waiver and estoppel, while applicable to grounds of forfeiture, cannot be invoked in reference to conditions going to coverage, whereby a new coverage and liability would be created, not included or contemplated by the policy.

Peters v. Great American Insurance Company, 177 Fed. 2d 773, 778.

16 *Appleman Insurance Law & Practice*, Sec. 9083, 9090 (1st Ed.) (1941).

Ash Grove Lime & Cement Co. v. Southern Surety Company, 225 M. A. 712 (39 S. W. 2d 434, 439).

Conner v. *Union Insurance Company*, 122 C. A. 105 (9 Pac. 2d 863, 865).

State Farm Mutual Insurance Company v. *Petsch*, 261 Fed. 2d 331, 335.

Fidelity & Guaranty Fire Corporation v. *Belquist*, 99 Fed. 2d 333, 335; 113 A. L. R. 857-871.

Nor is there a difference in Illinois between waiver and estoppel in interpretation of insurance contracts.

Stahly Cartage Company v. *Universal Mutual Casualty Company*, 11 Ill. App. 2d 368 (138 N. E. 2d 243, 244).

A provision prohibiting a change in policy coverages except by endorsement signed by an officer of the company, is a valid and binding requirement.

Providence Washington Indemnity Company v. *Varella*, 112 Fed. Supp. 732, 734.

Peters v. *Great American Insurance Company*, 177 Fed. 2d 773, 778.

Where there is no conflict between the words used in the exclusion clause and both the general and specific provisions may be given a reasonable effect, both are to be retained.

Bruce v. *Lumbermens Casualty Company*, 222 Fed. 2d 642, 644, 645.

The exclusion term "arising out of" sufficiently and clearly supports the enforcement of the exclusion where an accident does arise out of the use excluded.

Bruce v. *Lumbermens Casualty Company*, 222 Fed. 2d 642, 644, 645.

Underwriters at Lloyds v. *Cordova Air Line*, 283 Fed. 2d 659, 665.

Schmidt v. *Utilities Insurance Company*, 353 Mo. 213 (182 S. W. 2d 181, 183-185).

ARGUMENT

The Petitioner, Jewell Gabbard Litteral, instituted the present garnishment suit, including as a party the name of Louis Dyson, from whom she had previously secured a judgment.

Louis Dyson was the operator of the Illini Airport at Urbana, Illinois. In this garnishment suit, he is a nominal party. He did not appear or participate in the case.

THE AIRCRAFT POLICY (NO. 38622).

On August 26, 1955, Dyson secured from the Respondent insurance company an "Aircraft Liability Policy."

This policy provided that Coverage E (passenger injury liability) *was not included* except as respects the particular aircraft described by endorsement. (App. 24.)

The Globe Swift aircraft in which the passenger, Jewell Gabbard Litteral, was riding when it crashed was not named among the aircraft from which Dyson desired and secured Coverage E protection. After issuance of the original policy, Dyson sought and received passenger injury coverage (Coverage E) on other aircraft by the various endorsements 2 through 8. (App. 25-26.) Just as the Globe Swift aircraft was not included as to Coverage E in the original policy, neither was it added by the subsequent endorsements.

Although Petitioner has referred in her Petition to the Globe aircraft as an "after acquired aircraft," the record is barren of any evidence that Dyson acquired this aircraft after the policy was issued (August 26, 1955) and prior to the accident (September 5, 1955).

So far as the record discloses, Dyson actually owned the Globe aircraft before he received the original policy.

Dyson neither paid, nor was he ever charged, a premium for passenger liability coverage (Coverage E) on the Globe aircraft.

The policy did provide other coverages, viz.: Bodily injury except to passengers (Coverage D) and property damage (Coverage F). Such coverages were afforded all aircraft owned or later acquired by Dyson. (App. 21.)

The policy did not, substantially, limit Dyson's use of aircraft for which Coverages "D" and "F" were afforded, since it recited several uses, including pleasure and business, Industrial Aid, Limited Commercial and Commercial.

The only apparent limitation as to the type of aircraft to be included under Coverages "D" and "F" is that contained in Item 5 (App. 21), referring to "all N.C. licensed aircraft owned, operated, leased or borrowed, by the named-insured."

There are other pertinent policy provisions.

In Item 4 (App. 21), it was specifically set forth that the insurance afforded Dyson was to be only with respect to the coverages for which a specific premium was indicated, and each was subject to all exclusions and conditions set forth in the policy.

In the automatic attachment provision of the policy (App. 24) covering newly acquired aircraft, Dyson was to receive such coverages as were contained in the original policy schedule of coverages, *and nothing more*. Thus, Coverages "D" and "F" would automatically apply to newly acquired aircraft, but Coverage "E" (passenger injury liability) would not apply unless specifically added by endorsement.

We perceive no ambiguity in this policy of insurance.

Its terms and provisions convey a clear, plain and common sense meaning.

Petitioner was a passenger in the Globe aircraft. The pilot, Robert Schindler, with a view to a possible purchase, had borrowed it to take a trip to another state several hundred miles away. (App. 3.) No other persons were aboard. Shortly after take-off, and near the Illini Airport, it crashed to the ground and Petitioner was injured.

The policy did not provide passenger liability coverage on the Globe aircraft. The policy defined in simple language a passenger *wherever the word "passenger" was used*, as a person "while in the aircraft for the purpose of * * * flight, or attempted flight, therein." (App. 23.)

Petitioner was not a pilot, or a student pilot, or a paying occupant. She was simply in the aircraft for the purpose of flight. Petitioner was a passenger pure and simple as defined in the policy.

Basic principles of law must be given application in considering the issues raised in this case.

The primary purpose in construing an insurance contract is to give effect to the intention of the parties as expressed in the contract. Where the language is clear, the terms used are to be understood according to their plain ordinary sense. *Lentin* v. *Continental Insurance Company*, 412 Ill. 158, 105 N. E. 2d 735, 737; *Merchants Transportation Company* v. *Dubuque Fire & Marine Insurance Company*, 200 Fed. 2d 348; *Moscov* v. *Mutual Life Insurance Company*, 387 Ill. 378, 383-385, 56 N. E. 2d 399, 402-403.

The insurance policy must be construed according to the sense and meaning of the terms used by the parties. *Sistler* v. *Illinois Bankers Life Company*, 341 Ill. App. 512, 520, 95 N. E. 2d 507, 511.

It is not uncommon for insurance policies to define haz-

ards and specify the extent and limit of coverage as to different risks. A court is without authority to reject some express statements of coverage and declare some other coverage was intended to apply in all cases. This would violate the principle that a court cannot under the guise of construction make a new contract for the parties.

The rule of construction favoring the insured, only in case of ambiguity, does not authorize a perversion of language to create an ambiguity when none exists. *Yadro* v. *United States Fidelity & Guaranty Company*, 4 Ill. App. 2d 477, 481-482, 124 N. E. 2d 370, 372.

In construing the insurance contract, all accompanying riders and endorsements constitute, with the policy, the entire contract and must be considered together and in its entirety. In the event of any conflict between policy and endorsement, the terms of the endorsement will control. *Quinlan & Tyson* v. *National Casualty Company*, 311 Ill. App. 369, 36 N. E. 2d 470, 474-476; *Konrad* v. *Hartford Accident Company*, 11 Ill. App. 2d 503, 526, 137 N. E. 2d 855, 866-867; *Morris & Company* v. *Rhode Island Insurance Company*, 181 Ill. App. 500, 504, 17 N. E. 2d 619, 621.

A court must construe and interpret an insurance contract the same as any other contract. *Harrell* v. *Bankers Mutual Life Insurance Company*, 302 Ill. App. 374, 379-380, 23 N. E. 2d 818, 821.

The Court is not here concerned with whether the Globe aircraft was, under the after acquired aircraft clause, covered by Schedule "D" or "F" of the policy. The precise question here is whether the policy and its endorsements provided Coverage "E", passenger liability protection on the Globe aircraft, to the benefit of the Petitioner, a passenger injured while riding in the aircraft.

Such protection was expressly excepted by the very terms of the policy and endorsements thereto. No charge for such coverage was ever made, or paid.

Nothing, it is submitted, can be more crystal clear. Any other construction would destroy and render absurd the manifest purpose and expressed intent of the contract as made between the parties.

The coverage afforded newly acquired aircraft, as the policy states, was to be that provided by the original policy — certainly not passenger liability coverage.

Thus, although there is no proof that the Globe aircraft was an after acquired aircraft, this is of no significance. In either event, the policy did not automatically provide Coverage "E" protection.

Petitioner, in effect, has asserted that while the policy in truth provided no passenger liability coverage as to this aircraft owned by Dyson, on the date of its issuance, such liability can here be predicated upon the acquisition by Dyson of a new aircraft for which he should be given new and additional coverage, under the automatic coverage clause.

This argument is refuted by the contract. To so construe the policy and its endorsements would be a perversion of the language therein recited. It would create a new contract.

However, if such were a possible construction, then Petitioner should have established by proof that the Globe was a newly acquired aircraft — one acquired after August 26, 1955 when the original policy and endorsements 1 and 2 were issued.

Again, Petitioner asserts that Coverage "E" was to exclude only passengers for hire and all other passengers were covered with passenger liability protection on all aircraft owned by Dyson. The contract provided otherwise. It defined the word "passenger" whereby no question could later arise as to what the parties intended by the use of the word.

Similarity is seen by Petitioner in the definition of the word "passenger" in the instant case and the provision contained in the policy under consideration in *Ohio Casualty Company* v. *Gantt*, 256 Ala. 262; 54 So. 2d 595, 601. (Petition, p. 16.)

In the *Gantt* case, a student pilot was injured when landing an aircraft owned by the operator of a flying school. The policy insured all persons except passengers. It defined the word "passenger" as any person riding in the aircraft except a person operating the aircraft.

It is difficult to understand how a passenger can be something different than a guest or an occupant. Nevertheless, the Dyson policy afforded Coverage "E" protection only to those aircraft specifically enumerated by endorsement, and not to all aircraft owned by, or acquired by, Dyson. The *Gantt* case is not applicable.

Petitioner's recitation of the many risks an airport operator may encounter in a work-a-day world, does not authorize a Court's successive writing of a new contract providing coverage to fit each new situation that might arise, and for which Dyson might very well wish later that he had previously secured and paid for.

There is no evidence in this case, except the contract itself, by which Dyson's mind can be revealed. We cannot say that Dyson desired, or intended, coverage for every conceivable risk that might arise. Such was not his contract. No proof was offered as to what he desired or intended to secure by the policies. Such overall protection he neither ordered nor paid for.

Petitioner seeks to interpret the word "passenger" to suit her own present ambition. By recalling mirthful but non-judicial utterances of Amos and Andy, and Humpty-Dumpty (Petition, pp. 16-17), Petitioner ignores settled principles of law, and Petitioner expresses concern over

pilots, student pilots and renters, but the pilot, Schindler, is not the Petitioner here. The Petitioner here was, pure and simple, a passenger. Actually there is no proof as to whether she paid Schindler for her ride in the Globe aircraft or was riding gratis.

Coverages "D" and "E" obviously applied to the various "uses" enumerated in Item 6 of the policy. As to those aircraft specifically listed by endorsement, and for which a special premium of 40 cents per day was charged, Coverage "E" was also applicable. Thus, plaintiff's fear that "defendant seeks to nullify all protection promised by Coverage D * * *" (Petition, p. 17) has been allayed.

Under Coverage "D", if a person, not a passenger as defined by the policy, was injured when one of Dyson's planes collided with him on the ground, exploded and burned him while walking nearby, struck a hangar or tower while he was at work, or in too many instances to enumerate, such person would be fully covered.

However, if a passenger as defined in the policy was injured, only to the extent Coverage "E" applied would such a person be afforded protection. These are the clear and simple provisions of the contract of insurance.

In *Wold v. Glen Falls Indemnity Company*, 269 Ill. App. 407, cited by Petitioner (Petition, p. 18), the policy insured the use of any vehicles in the business of the owner, or otherwise. Then, in Paragraph 4, it recited that the insured's occupation was contract hauling for Protection Products Company only.

The accident occurred while the insured was hauling packages to Protection Products Company, but was also carrying on the truck packages to be delivered ultimately to another company.

The Court there held these two policy provisions to be somewhat contradictory. The second tended to limit, or

restrict, the first. The construction appearing more reasonable and more favorable to the insured was adopted.

In the instant case, no conflict appears. The policy clearly and without ambiguity provided that passenger liability was not included except by specific endorsement. The *Wold* case is not in point.

Petitioner cites *Scott* v. *Freeport Casualty Company*, 392 Ill. 332 (Petition, p. 18), where the person who was insured in the farm business did, on one isolated occasion, use his vehicle as a salesman. Such an isolated use was held not to vitiate the policy, stating the use to be as a farmer. Occasional incidental acts did not constitute a change of the usual occupation of farmer to that of salesman.

Since Dyson never had passenger injury coverage on the Globe aircraft, no question arises concerning any change in occupation or business whereby some coverage actually provided is sought to be held voided. The *Scott* case is not in point.

In supporting the decision rendered by the Trial Court and the Court of Appeals, Respondent here relies simply and completely on the contract made, and the basic principles of law applicable.

In the absence of a clear and apparent ambiguity, neither party can be favored in the construction of the contract of insurance. The terms used may not be distorted from their natural meaning, and the agreed liability of the insurer enlarged. *Colonial Coach Manufacturing Company* v. *Home Insurance Company*, 260 Fed. 2d 532; *Carter* v. *Nehi Beverage Company*, 329 Ill. App. 329, 332; 68 N. E. 2d 622, 623.

Within the rule of reason and common sense, *when a clear ambiguity does exist*, that construction which is more favorable to the insured will be adopted. This rule does not authorize a perversion of the language used in order to

create an ambiguity where none exists. *Fadro v. United States Fidelity & Guaranty Company*, 4 Ill. App. 2d 477, 481-482; 124 N. E. 2d 370, 372.

Contrary to Petitioner's assertion (Petition, p. 10), Dyson did not want passenger liability coverage on all of his aircraft—certainly not on the Globe aircraft. (He probably could not afford it.) If Dyson had wanted this protection at the additional 40 cents per day charge, he would have secured it by endorsement—just as he did on certain other aircraft by endorsements 2, 3, 4 and 5. (App. 25-26.)

Petitioner contends that Respondent is estopped to deny that Coverage "E", passenger liability coverage, existed, because it notified the Department of Aeronautics on September 10, 1955 that under the policy such liability coverage existed.

Petitioner raised this issue of waiver or estoppel in the Trial Court. In the Court of Appeals, Petitioner, for the first time, declared that it is not strictly a matter of waiver or estoppel, but simply a matter of interpreting an ambiguous, doubtful and uncertain contract, in the manner the parties themselves by their own acts intended it to read.

Any construction whereby passenger liability coverage on the Globe aircraft can be created, would do violence to the clear and explicit terms and provisions of the policy.

Certainly any contended understanding of the contract on the part of Respondent, based on its accident report form, was not also the understanding of Dyson. In this there is no mutuality of understanding, obligating Dyson to pay an additional $146.00 of premium (40 cents per day for 365 days). There is no proof Dyson so understood his contract. The evidence is to the contrary. The policy refutes any such contention.

Dyson did not believe that he had secured Coverage "E"

protection on the Globe aircraft, nor as Petitioner boldly states, without proof, Dyson did not believe he had secured and paid for such protection on every aircraft he owned.

It must be noted that while Petitioner states (Petition, p. 11, bottom), "Louis Dyson filed his report (Plaintiff's Exhibit 8A) describing the accident and showing that such coverage was carried * * *", nowhere in the Appendix can such an Exhibit 8A be found. There is, in the Appendix (App. 29), an exhibit, being a printed form directed to and executed by the Respondent, but not directed to or executed by Louis Dyson.

The Respondent filled in and signed the foregoing accident report form and filed it with the Department of Aeronautics of the State of Illinois. This was a unilateral act done by respondent outside the presence of, and without the knowledge of, Dyson.

Petitioner here, as in the Court of Appeals, asserts that the act of the Respondent in executing and filing the accident report form constituted an interpretation or construction of the insurance contract by both the insurer and the insured, whereby Respondent is now estopped to deny that the policy provided coverage for the benefit of Petitioner.

In each of the citations appearing in the Petition (pp. 10-14), the Court was confronted with the necessity of construing and interpreting doubtful, peculiar or ambiguous terms of a contract. None of these cases concerned insurance policy contracts. In each case, the parties, by their bilateral acts or conduct, had interpreted the contract or agreed to place a certain construction on the terms of the contract which was held to be helpful to the Court in performing its duty in determining what the actual intent of both parties had been when the contract was originally entered into.

In *City of Chicago* v. *Chicago City Railroad*, 245 Ill. App.

473 (Petition, p. 10), the defendant had deducted from its net income each year before determining the amount due the city for its franchise, its Federal income taxes under the contract provision permitting deduction of "all capital stock or franchise taxes." For a period of years the plaintiff, City of Chicago, had actual or constructive notice of this practice and made no objection. Because both parties had followed such an interpretation of the contract, the Court construed the provision involved as including Federal income taxes.

In *Stetson* v. *Chicago Aurora & Elgin Railroad*, 2 Ill. App. 2d 274 (Petition, p. 10), an employee claimed he was entitled to vacation benefits over and above his salary. For a period of years both the employer and employee had followed an arrangement or understanding whereby no vacation benefits were accorded the employee over and above his salary. Such interpretation of the agreement followed by both parties for a period of years was given effect by the Court as being highly persuasive in interpreting the contract.

In *Walters* v. *Walters*, 409 Ill. 298 (Petition, p. 10), the Court was called upon to interpret a settlement agreement entered into at the time of a divorce, which agreement the Court found to be ambiguous, but since in reliance on the husband's promises the wife had thereafter executed various deeds and assignments in order to give effect to the agreement, such acts of performance had so clearly indicated what both the husband and wife believed to be their true contract, that the Court did so interpret the settlement agreement.

In *Weger* v. *Robinson Company*, 340 Ill. 81 (Petition, p. 10), the Court was called upon to interpret a guaranty contract and observed that where both parties have construed their contract in a certain manner, or one has interpreted the contract in a certain manner to the knowledge

of the other party to the contract, the Court will adopt such interpretation, provided that such interpretation can be adopted without the making of a new contract for the parties.

In *Collins Company* v. *Silver*, 150 Ill. App. 430 (Petition, p. 11), the Court observed that the parties acting together had placed a certain construction upon their contract and having done so the Court will adopt such a construction.

In *Alexander* v. *Barrett*, 46 Ill. 226 (Petition, p. 13), the defendant had insisted on one interpretation of the contract and the plaintiff on another, but thereafter the plaintiff agreed to accept defendant's interpretation and thereafter defendant refused to perform in compliance with his own interpretation. The Court observed that justice required that the defendant be held to his own understanding of the contract and awarded damages to the plaintiff for breach of the contract.

In *Schmohl* v. *Fiddick*, 34 Ill. App. 190 (Petition, p. 13), the Court held that where a contract is doubtful or peculiar and the parties to the contract have by their declarations and acts together placed a reasonable construction upon the contract, such construction will be adopted by the Court in a suit requiring interpretation of the terms thereof.

In *People* v. *Adams*, 65 Ill. App. 283 (Petition, p. 14), the County Board of Supervisors had fixed the salary of the County Clerk. A dispute later arose as to whether under the order fixing the salary, the County Clerk could properly make claim for extra expenses of his office, including clerk hire, fuel and stationery. It appeared from the evidence that for a period of four years the County Board had, with knowledge but without objection, paid such claims for extra clerk hire, fuel and stationery, and not until four years after his term of office had expired had demanded from the County Clerk repayment of such items.

claiming that such were not included in a proper interpretation of the word "salary." The Court observed that the order fixing the salary was ambiguous in its terms, and that in construing the order, special credence would be placed by the Court upon the evidence showing that the County Board for many years had not questioned the right of the clerk to deduct such items of expense, and the Court declared that the interpretation which both parties had placed upon the order would be adhered to by the Court.

In the case at bar, the contract of insurance was clear and unambiguous. The interpretation or construction sought by Petitioner stems from the signing by Respondent alone of an accident report form.

Examination of this report form (App. 29) reveals that Respondent properly therein stated that "with regard to the aircraft liability insurance policy," such policy was in force and it did provide passenger liability coverage. It did not attempt to list the specific aircraft for which the policy would provide passenger injury liability coverage and any inference therefrom that the Globe Swift aircraft was so insured would have been misleading and unfortunate. Such a misleading inference, if it existed, could not create a new contract enlarging the coverage of the policy.

There was no passenger liability coverage on this Globe aircraft. The accident report form was not sufficient to change the clear and explicit terms of the policy and provide new and additional coverage not theretofore existing.

Any coverage to be predicated upon the accident report form must result from application of the principle of waiver or estoppel.

The doctrine of waiver or estoppel does not apply to matters of coverage so as to extend the scope of the contract beyond its express terms through the acts or conduct of an agent.

This doctrine cannot be invoked to create a primary liability and bring within the coverage risks not included, or contemplated, by its terms.

Conditions going to coverage, as distinguished from those going to a ground of forfeiture, may not be waived by the conduct or action of an agent.

The broadening of coverage of a policy so as to make it cover a risk not within its terms, is not a mere waiver of a condition in the policy, but the making of a new contract. *Peters* v. *Great American Insurance Company*, 177 Fed. 2d 773, 778; 16 *Appleman Insurance Law and Practice*, Sec. 9083, 9090; *Ash Grove Lime & Cement Company* v. *Southern Surety Company*, 225 M. A. 712, 39 S. W. 2d 434, 439; *Conner* v. *Union Insurance Company*, 122 C. A. 105, 9 Pac. 2d 863, 865; *State Farm Mutual Insurance Company* v. *Peisch*, 261 Fed. 2d 331, 335, 113 A. L. R. 857-871.

In interpreting insurance contracts in Illinois, there is no difference between the doctrines of waiver or estoppel. *Stahly Cartage Company* v. *Universal Mutual Insurance Company*, 11 Ill. App. 2d 365, 368, 138 N. E. 2d 243, 244.

In Illinois (Illinois Revised Statutes, Chapter 95½, Section 9-201), as in other states, there exists a statute commonly referred to as the "Guest Statute."

Under this statute, no person riding in a motor vehicle as a guest without payment shall have a cause of action for injuries caused by the host driver of the vehicle unless the accident was caused by the wilful and wanton misconduct of the host. In interpreting the word "guest" as used in this specific statute and as applied to suits brought by persons riding in a vehicle against the driver for wilful and wanton misconduct, the Illinois Supreme Court, *Connett* v. *Winget*, 374 Ill. 531 (Petition, p. 16), observed that the meaning of the word "passenger" is entirely different than the word "guest."

The *Connett* case dealt with the determination of whether or not a passenger was a guest under the guest statute, and has no application to this case. It involved an action against the driver of an automobile, while the instant case is an action against the owner of the airport and not the pilot of the airplane. Whether or not the Petitioner was a "guest" passenger or a "paying" passenger is of no consequence in this case. Moreover, the term "guest" is merely a descriptive term as to a certain type of passenger. This is illustrated by the following comment made by the Court in *Connett v. Winget*, 374 Ill. 531, 534, 30 N. E. 2d 1, 3:

> "It is clear the intention of *the passenger*, alone, does not determine *whether he becomes a guest*, since the invitation and the purpose of the ride may originate wholly with the owner of the automobile." (Emphasis added.)

More important, the definition of the term "passenger" in the policy answers all questions regarding this matter in that the Petitioner clearly comes within that definition.

THE "AIRPORT POLICY" (NO. 9941).

Petitioner does not seriously take issue with the decision of the District Court and the Court of Appeals, for she says (Petition, p. 18), "When we come to the airport policy there is more basis for the result reached by the Court of Appeals."

On April 3, 1955, Dyson secured from the defendant a policy of insurance designated as "Airport Liability Policy."

This policy provided coverage, subject to all exclusions, for injuries to persons arising out of the ownership, maintenance or use of the airport premises.

The policy contained an exclusion clause (f) (App. 28),

stating that the policy did not apply to injuries caused by, or arising out of, the existence, maintenance or use of any aircraft owned by Dyson, or any aircraft in flight for, or on account of, Dyson.

Petitioner secured her original judgment against Dyson on November 9, 1959. In that judgment Order are findings of fact that Petitioner's injuries were the direct and proximate result of one or more of a combination of acts of negligence on the part of Dyson, as follows:

1. Negligently directed the aircraft to take off in a cross-wind.
2. Negligently furnished a plane with a defective propeller.
3. Negligently operated his airport in violation of statute, and with a hazard located nearby.

Louis Dyson sought a policy of insurance to cover liability for his airport operations. He secured other insurance for liability in the use of aircraft.

The Insurance Company of North America was willing to issue to Dyson its Standard Airport Policy, whereby it insured him against liability for injuries occasioned to any person "arising out of the ownership, maintenance or use of the airport premises."

The company was willing to issue such a policy, however, only with the distinct, clear and explicit understanding that such policy would not apply to *injuries in any way caused by, or arising out of, the existence* of any aircraft owned by Dyson. Further, the policy would not apply to *injuries caused by, or arising out of, the use of* any aircraft owned by Dyson.

Further, the policy would not apply to *injuries caused by, or arising out of, any aircraft in flight* by, or for, the account of Dyson.

While the November 9, 1959 judgment found that Petitioner's injuries were occasioned by one or more of a combination of negligent acts, some of which referred to the operation of the airport and some to the condition of the aircraft, it is crystal clear that Petitioner was injured only when the aircraft struck a power line 500 or 800 feet away from the airport.

As appears manifest from the policy contract, the insurance company was not willing, nor was it paid a premium, to cover a risk in which the injuries suffered were (remotely or primarily) in any way connected with the *existence, maintenance or use* of an aircraft owned by Dyson, nor to any injuries in any way connected with an aircraft in flight on the account of Dyson.

The Exclusion Clause (f), being a standard provision of such contract, was inserted in the contract for a distinct purpose. Its meaning is clear, and simply this—that the policy would not cover injuries involved in the use of an aircraft owned by Dyson. Such was the occurrence in question, and such a peril or risk was not insured against by the contract.

Standing alone, without the exclusion clause, this policy conceivably could cover the injuries suffered by Petitioner.

This Court cannot reject Exclusion (f) in the policy, and declare that paragraph 1° of the Insuring Agreement was intended to apply in all cases, and ignore the limitations thereon appearing in Exclusion (f). *Yadro* v. *United States Fidelity & Guaranty Company*, 4 Ill. App. 2d 477, 481-482, 124 N. E. 2d 370, 372.

Petitioner contends the cause of the accident was negligent airport maintenance and operation which, under the Insuring Clause A (App. 27), renders the Respondent liable.

In this, Petitioner ignores the Exclusion Clause (f) (App. 28), which excepts injuries "arising out of" as well as those "caused by" the use of any aircraft owned by Dyson.

While, as the Trial Court observed, these words "arising out of" constitute a very broad phrase, yet it cannot be denied that the accident and injuries did arise out of the use of the aircraft. With such a clear and explicit exclusion, it would be improper to rewrite the policy by accepting Petitioner's desired contention. *Schmidt* v. *Utilities Insurance Company*, 353 Mo. 213, 182 S. W. 2d 181; *Underwriters at Lloyds* v. *Cordova Airlines*, 283 Fed. 2d 659, 665; *Bruce* v. *Lumbermens Casualty Company*, 222 Fed. 2d 642, 644-645.

The insuring agreement expressly by its terms was "subject to the limits of liability, exclusions, conditions and other terms of this policy."

The language of the policy being clear and explicit, the terms, provisions and exclusions therein contained must be taken and understood in their plain, ordinary and popular sense.

It is the intention of the parties as expressed by the words used in the contract, to which the Court must give effect. *Lenten* v. *Continental Insurance Company*, 412 Ill. 158, 162-163, 105 N. E. 2d 735, 737; *Merchants Transportation Company* v. *Dubuque Fire & Marine Insurance Company*, 200 Fed. 2d 348, 351; *Moscor* v. *Mutual Life Insurance Company*, 387 Ill. 378, 383-385, 56 N. E. 2d 399, 402-403.

In the *Moldovan* v. *United States Fidelity & Guaranty Company* case (184 N. Y. S. 2d 201), cited by Petitioner at page 20 of her Petition, the policy under consideration did not contain an exclusion clause such as in the present case, whereby the *Moldovan* case is not in point. Obviously

in our case, without the exclusionary clause as the Trial Court pointed out, a basis for coverage would exist.

Insofar as the airport policy is concerned, we deem the sole question for consideration to be, did the injuries suffered by the plaintiff in any way arise out of, or were they caused by, the existence, maintenance or use of Dyson's Globe aircraft, or were Petitioner's injuries caused by, or did they arise out of, any aircraft in flight for the account of the insured?

The terms used in the policy may not be distorted from their natural meaning, and the agreed liability of the insurer enlarged. *Colonial Coach Company* v. *Home Insurance Company*, 260 Fed. 2d 532, 534; *Carter* v. *Nebi Beverage*, 329 Ill. App. 329, 332, 68 N. E. 2d 622, 623.

Petitioner's injuries arose out of a violent crash of an aircraft in flight, owned by Dyson, clearly excluded by the policy terms.

CONCLUSION.

We respectfully submit that the Petition herein reveals no error in the decisions sought to be reviewed; that the case involves primarily the application of settled principles of law to the clear and plain language of an insurance policy in which two Courts below have unanimously agreed.

The judgment below does not conflict with decisions of this Court, or of other Courts of Appeal, or of the Courts of the State of Illinois.

There is no question involved of such a general or unusual nature as would here warrant the granting of certiorari.

For the foregoing reasons the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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